PETITION

FOR A

WRIT OF

CERTIORARI

13

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 660

VICTRYLITE CANDLE CO., A WISCONSIN CORPORATION,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (AND BRIEF IN SUPPORT THEREOF).

EDWARD BRODKEY,
FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
ALBERT BRICK,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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OCTOBER TERM, 1952.

No. .....

VICTRYLITE CANDLE CO., A WISCONSIN CORPORATION,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
G. F. GEISSLER, ADMINISTRATOR, PRODUCTION AND MARKETING ADMINISTRATION,
HARRY E. REED, DIRECTOR, LIVE STOCK BRANCH OF THE PRODUCTION AND MARKETING ADMINISTRATION,
E. L. GRIFFIN, CHIEF, INSECTICIDE DIVISION, LIVE STOCK BRANCH OF THE PRODUCTION AND MARKETING ADMINISTRATION, AND
JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (AND BRIEF IN SUPPORT THEREOF).

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Victrylite Candle Co., a Wisconsin Corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review

the decision of the United States Court of Appeals for the District of Columbia Circuit, rendered on December 22, 1952, which affirmed a judgment of the United States District Court for the District of Columbia denying petitioner's motion for an injunction.

JURISDICTION.

Jurisdiction to review this case upon a writ of certiorari is conferred upon this Court by 28 U. S. C. § 1254(1). The opinion of the Court of Appeals for the District of Columbia Circuit was filed December 22, 1952.

OPINIONS BELOW.

The opinion of the District Court of the District of Columbia is not reported. It is printed in the record (R. 73A).

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 201 F. 2d 206. It is printed in the record (R. .....).

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7. U. S. C. § 135g, 61 Stat. 170) permits "multiple seizures" of insecticides alleged to be misbranded.

2. Whether said Act, should it permit such "multiple seizures" of insecticides alleged to be misbranded, is unconstitutional as violative of the prohibitions of the Constitution against deprivation of property without due process of law and denial of equal protection of the laws.

3. Whether administrative agencies, in making such

"multiple seizures" of insecticides alleged to be misbranded, are acting illegally in so doing.

4. Whether a District Court has any discretion in granting or refusing an injunction against making such "multiple seizures" of an insecticide alleged to be misbranded, or whether such court is required to enjoin such unconstitutional and illegal acts.

STATUTES INVOLVED.

Pertinent provisions of the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U. S. C. § 135g, 61 Stat. 170), as well as comparable provisions of the Food and Drugs Act of 1906 [Wiley Act] (21 U. S. C. Sec. 14, Act of June 30, 1906, c. 3915, § 10, 34 Stat. 771), and of the Food, Drug and Cosmetic Act of 1938 [Copeland Act] (21 U. S. C. § 334, Act of June 30, 1938, c. 675, § 304, 52 Stat. 1044), are set forth in the Appendix.

STATEMENT.

On July 10, 1952, Victrylite Candle Co., a Wisconsin Corporation, petitioner herein, filed its verified complaint in the United States District Court for the District of Columbia praying that that court restrain and enjoin respondents herein, who are the Secretary of Agriculture, certain subordinate officials of that department and the Attorney General of the United States from making "multiple seizures" of petitioner's product "Moskeeto Lites With an Effective Mosquito Repellant" under the provisions of the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U. S. C. § 135g, 61 Stat. 170). The complaint alleged that four separate seizures of its product had been made, three in Chicago, Illinois, and a fourth in Washington, D. C. (R. 5A and 6A) pursuant to the Government's charge that the

REASONS FOR GRANTING THE WRIT.

1. The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

The Court of Appeals, in its decision dated December 22, 1952, of which review is here sought, held, in effect, that the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (61 Stat. 170, 7 U. S. C. § 135g) permitted "multiple seizures" of insecticides alleged to be misbranded. On page 3 of that opinion (R. .....) the Court said:

> "The statute does not prescribe that only one seizure is permissible. It cannot be said, therefore, that the statute has been or is being violated by appellees * * *." 201 F. 2d 206, 207.

There have been no decisions of this Court or of any Court of Appeals, other than the court below, as to whether or not "multiple seizures" of insecticides alleged to be misbranded are permissible under the provisions of Section 9 of the present "Insecticide Act" above cited, and in view of the fact that

(a) this Court has undertaken to pass upon the question of the permissibility of such "multiple seizures" under the provisions therefor contained in the Federal Food, Drug and Cosmetic Act of 1938 (Act of June 30, 1938, c. 675, § 304, 52 Stat. 1044, 21 U. S. C. § 334), *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950),

(b) the language, legislative history and subject matter of the statute applicable in that case and that in the case at bar are substantially dissimilar, and

(c) "multiple seizures" of articles alleged to be misbranded are commonly and frequently made under both statutes, in which cases it would appear that a constitutional question is presented in that prop-

> erty is taken, as it is claimed, without due process of law and in denial of equal protection of the laws,

it seems desirable that this Court pass upon the permissibility of such "multiple seizures" under the applicable provisions of the "Insecticide Act", at this time.

2. The decision below is in conflict with a decision of a District Court and with a prior decision of the court below.

While the Court of Appeals affirmed the order of the United States District Court for the District of Columbia holding, in effect, that "multiple seizures" of insecticides alleged to be misbranded were permissible under the language of the "Insecticide Act of 1947" and declining to enjoin such seizures, the United States District Court for the Northern District of Illinois, Eastern Division, on application of petitioner herein, granted such a preliminary injunction against various subordinates of the present respondents then within the jurisdiction of that court. *Victrylite Candle Co.* v. *Tiedt, et al.*, D. C., N. D. Ill., E. D., No. 52-C-1402 (1952). That decision, granting the identical injunctive relief herein denied on the same state of fact, was unreported. The order for temporary injunction, entered on July 25, 1952, one day following the order of denial in the District Court for the District of Columbia, recited:

> "This cause coming on to be heard upon plaintiff's motion for a preliminary injunction and upon the verified complaint, the court having considered the verified complaint, having heard the evidence adduced in open court, and having heard the statements and arguments of counsel and being fully advised in the premises, the court makes the following

FINDINGS OF FACT.

"1. Defendants have instituted or caused to be instituted *two* libel actions in Chicago, Illinois, against plaintiff's product known as 'Moskeeto-Lites with an effective mosquito repellent' for alleged misbranding of said product.

"2. Defendants have threatened and will, if not restrained, presently institute or cause to be instituted many further and additional libel for condemnation actions based upon the same alleged misbranding.

"3. As a result of the acts of defendants complained of and sought to be enjoined, plaintiff's name, business, good will and reputation have been injured and damaged, whereby plaintiff has suffered losses of many thousands of dollars which, unless said acts are restrained, plaintiff will continue to suffer such loss and such loss will increase should further libel actions be instituted.

"4. The loss of the value of the products which have been already seized in the aforesaid two libel for condemnation proceedings, together with the loss of the value of the products threatened to be seized by the defendants in the future, constitute and will constitute irreparable injury, loss and damage to plaintiff, in that such widespread libels and seizures will crush the morale and almost destroy the efficiency of plaintiff's distribution organization, and no legal remedy exists whereby such loss could now, or in the future be recouped by plaintiff.

"5. The various attorney's fees and court costs to which plaintiff has already been subjected, and those to which future libel for condemnation actions will subject plaintiff, in the defense thereof, has necessarily imposed and will, in the future, impose irreparable injury, loss and damage to plaintiff, in that no legal remedy exists whereby such costs can be or could, in the future, be recouped.

"On the basis of the foregoing the court makes the following

CONCLUSIONS OF LAW.

"1. The court, sitting as a court of equity, *will enjoin* acts of defendants which result in a *multiplicity of suits.*

"2. The conduct of defendants in making multiple seizures of plaintiff's product and filing multiple libel for condemnation actions, threatening to make additional seizures and to file additional libel for condemnation actions *amounts to arbitrary exercise of power,* and *is a deprivation of due proces of law.*

"3. Plaintiff is entitled to a temporary injunction against defendants restraining and enjoining further seizures and further libel for condemnation actions within the territorial jurisdiction of this court pending the determination of this action.

ORDER.

"WHEREFORE, IT IS ORDERED that the defendants, their agents, servants, employees, attorneys or others in active concert and participation with them be and they hereby are restrained and enjoined, pending the determination of this action, from seizing or causing to be seized any of plaintiff's product known as 'Moskeeto-Lites, with an effective mosquito repellent' in the Northern District of Illinois, and from instituting or causing to be instituted and from prosecuting any further and additional libel for condemnation actions against plaintiff's product known as 'Mosqueeto-Lites (*sic*) with an effective mosquito repellent' in the Northern District of Illinois, based upon the alleged misbranding of said product, provided that the plaintiff first give security in the amount of Two Hundred Fifty ($250.00) Dollars for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully restrained and enjoined, such bond to be approved by the Court or by the Clerk of Court.

"Issued at 25 M., July ....., 1952.

ENTER:

s/ J. S. PERRY,

Judge, United States District Court."

(Italics ours.)

Defendants in that case, being the subordinates of the respondents in this case, did not appeal from that decision. It would therefore appear that the decisions of the District Courts of the Northern District of Illinois and of the District of Columbia (and the decision of the Court of Appeals predicated upon the latter) are in conflict on the identical state of fact, except that a smaller number of seizures was involved in the Illinois case. It is accordingly urged that this Court resolve said conflict.

Further, the same Court of Appeals for the District of Columbia to which it is here asked that a writ be directed, in its prior decision in *National Remedy Co.* v. *Hyde,* 60 App. D. C. 252, 50 F. 2d 1066 (1931) held that the process of conducting "multiple seizures" of a drug alleged to be misbranded was unconstitutional. That decision was under an identically worded provision in the Food and Drug Act of 1906 (The Wiley Act). The Court, in quoting with approval the opinion of this Court in *ex parte Young,* said, at page 1068 of its opinion:

> "In *ex parte Young,* 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, it was held that while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, when such remedy can only be determined by judicial determination and construction, a provision in a statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and *denies them the equal protection of law.*" (Emphasis supplied.)

That Court further there said:

> "In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect *deprive appellant of its property* through

> the destruction of its business before the issues involved could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to *arbitrary exercise of power* and is a *deprivation of due process of law.* * * *" (Emphasis supplied.)

If such a course (making "multiple seizures") in the opinion of that Court, "denies" the parties affected thereby "the equal protection of the law" and "deprives" such parties of their property through "arbitrary exercise of power" in "deprivation of due process of law," such a course can only be regarded as illegal and unconstitutional and no court could legally or in good conscience refuse to enjoin such acts.

Petitioner cited this decision to the Court of Appeals, but it was persuaded to abandon and repudiate its former well-considered precedent and observe that (R. .....):

> "True, as this court held in *National Remedy Co.* v. *Hyde*, 60 App. D. C. 252, 50 F. 2d 1066 (1931), multiple seizures may be so arbitrarily and destructively engaged in as to amount to a denial of due process, in which event equity may intervene by its injunctive process. But in that case a court of competent jurisdiction had held the questioned product not to be misbranded and for six years thereafter it had been sold in interstate commerce without objection. Condemnation suits were then instituted in more than seven jurisdictions throughout the United States, raising the same issue that had been previously adjudicated. Here, by contrast, what is needed is an adjudication on the question of misbranding. This can be obtained through the seizure and libel procedure. An effort to that end not having succeeded in Illinois, the Government made a seizure in this jurisdiction. This is not arbitrary or oppressive." 201 F. 2d 206, 207.

Section 304 (a) of the Food, Drug and Cosmetic Act of 1938 (Copeland Act), above cited, under which this Court decided the *Mytinger & Casselberry* case, *supra,* provides specifically:

> "Any article of food, drug, device or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against * * * on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found." etc.
>
> "*Provided, however,* that no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel or condemnation proceeding under this Act based upon the same misbranding * * * when * * *." etc.

The above proviso clearly shows that Congress intended to authorize "multiple seizures" of misbranded drugs "when", but only when, certain specified conditions obtained. These conditions were that "such misbranding has been the basis of a *prior judgment* in favor the United States * * * or when the Administrator *has probable cause to believe from facts found* * * * that the misbranded article is *dangerous to health* or that the labeling * * * is *fraudulent* or would be in a material respect *misleading* to the * * * purchaser." (Emphasis supplied.) It is respectfully submitted that in any instance where one of the said conditions obtained, the constitutional guarantees against deprivation of property without due process must yield to the proper exercise of the police power; and a prior finding of "probable cause to believe" violation exists "from facts" is a jurisdictional prerequisite to "multiple seizure" for fraudulent or misleading labeling under the Act. The language employed by the Copeland Act, *supra,* concerning "multiple seizures" is a

far cry from that of the "Insecticide Act" applicable to the case at bar, which provides only that

> "Any economic poison or device that is being transported [in interstate commerce] shall be liable to be proceeded against in any district court of the United States in the district where it is found and seized for confiscation by a process of libel for condemnation—
>
> (1) in the case of an economic poison—
>
> (a) if it is adulterated or misbranded; * * *."

This last quoted language is identical to that utilized by the Food and Drugs Act of 1906 (Wiley Act), the pertinent provisions of which are reproduced in the Appendix, concerning which the Court of Appeals, in the case of *National Remedy Co.* v. *Hyde, supra,* held "multiple seizures" unconstitutional.

Another marked difference between the provisions of the "Insecticide Act" and the present Food, Drug and Cosmetic Act which may in part account for the disposition of this Court to hold the seizure provisions of the latter Act constitutional is the provision in the Food, Drug and Cosmetic Act for the consolidation and removal to a single jurisdiction of causes of action arising out of "multiple seizures" (21 U. S. C. § 334 (b)). There is no such provision in the "Insecticide Act". Its absence can only mean that Congress did not contemplate more than one seizure of any such product and accordingly thought that it would be unnecessary to provide for such consolidation of causes of action. This position is strengthened when we are reminded that had Congress intended to authorize "multiple seizures" under the current "Insecticide Act", which was not passed until 1947, with full knowledge of what the courts required to be spelled out in the Food, Drug and Cosmetic Act of 1938, Congress could have so specifically authorized. It is a fundamental principle of statutory construction that a later statute may be inter-

preted in the light of the wording of a prior act. And it should be obvious that without provision for consolidation of a multiplicity of suits, there can be no truly adequate remedy at law.

To suggest that the statutes in question are of similar character simply because they both provide for seizure of products which may, under certain conditions, be injurious to the public is to ignore the differences between products and their relative effects upon the public as these may affect the concept of balance between public interest and private property. In the *Mytinger & Casselberry* case, *supra,* this Court said at page 601 of its opinion:

> "Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and *decided* in favor of the speedy, preventive device of multiple seizures."

How much Congress was influenced in so doing by the possibility of the public consuming unwholesome and dangerous foods is not apparent but it seems logical to assume that this consideration was of paramount importance and uppermost in its mind. On the other hand, we are now considering a statute covering "insecticides" which are not ingested by man and are not inherently dangerous to his health. It seems safe to assume that this difference in subject matter was controlling in the decision of Congress to make no mention of "multiple seizures" in the "Insecticide Act". It seems absurd to suppose that Congress intended to grant greater powers over seizure of insecticides than over contaminated foods.

Moreover, while petitioner does not believe that this Court decided the *Mytinger & Casselberry* case, *supra,* on the issue of constitutionality, the expression of the Court's opinion that congressional provision for "multiple seizures" in certain instances would be constitutional is not

to be interpreted as a *carte blanche* warrant for all such legislation. It is respectfully submitted that it is one thing to say that a Statute is constitutional which permits "multiple seizures" under certain limited and specified conditions wherein the public welfare is immediately and vitally affected, in which case the Government may constitutionally act under its police power, and quite another to say that the Government may make unlimited "multiple seizures" at will, without regard to the effect upon property, the prior demonstration of a claim of right or of the existence of probable cause to believe there had been a violation of the Act.

But petitioner does not believe this Court decided the *Mytinger & Casselberry* case on the constitutional issue. In that case, as in this, there was no claim that the article was dangerous to health or that the labeling was fraudulent. The Administrator's case rested solely on the provision covering misleading labeling. The complaint there was that the Administrator had made a preliminary determination of probable cause to believe there had been violation of the Act "without a hearing", as specifically authorized by its terms. It was urged that this deprivation of a preliminary administrative hearing constituted a deprivation of due process.

Petitioner recognizes that there are many decisions that hold due process does not require a hearing at any particular stage of an administrative proceeding so long as a judicial hearing is held before any official binding order is entered. *Lichter* v. *United States,* 334 U. S. 742 (1948). This would seem to apply *a fortiori* where the Administrator makes a mere preliminary finding of probable cause to institute judicial proceedings. The question presented to this Court by the *Mytinger & Casselberry* case was whether the plaintiff should have been granted a hearing or an injunction by the court, despite the provision in the

Food, Drug and Cosmetic Act that a hearing is not necessary, in view of the arbitrary conduct displayed in that case, which might itself be termed an abuse of process, and because of the irreparable injury which might result in anticipation of a judicial hearing. This ultimate issue, which constituted the *ratio decidendi* in the District Court, seems to have been overlooked by this Court on review. Administrative officers might accordingly abuse their powers and destroy private business by arbitrary and capricious action before any of the issues can be tried. And in the *Mytinger & Casselberry* case there would appear to be justification for upholding the District Court in its attack on the administration of the Act, thereby avoiding the constitutional issue. It is therefore respectfully suggested that the decision of this Court in that case was not necessarily determinative of that issue with respect to the particular Act then under consideration, let alone with respect to a totally different statute.

To follow the construction of the Act for which it is here anticipated respondents will contend and such denial of injunctive relief to petitioner as would thereby follow, would result in petitioner being greatly damaged at the outset by the seizures in the monetary value of the property involved, plus the loss of good will from the notoriety given the seizure actions, plus the loss of the required expenses of litigation in many jurisdictions. The court below said (page 4 of its opinion) (R. .....):

> "Here * * * what is needed is an adjudication on the question of misbranding. This can be obtained through the seizure and libel procedure." 201 F. 2d 206, 207.

The inescapable inference is that the court thought such a hearing would suffice. Petitioner's victory in the libel court would be a hollow victory, since it will receive no compensation for its loss of good will, if, indeed the action does not put it out of business before that time. Further, the

Government will be able to file any additional libels it may desire, thereby requiring plaintiff to defend in many places. And if it be suggested that a determination of any one such proceeding will constitute *res adjudicata* as to the remainder of the pending cases, it will be a sufficient answer to reflect that in such event, it will still be necessary to prove that defense in each suit.

The sanction here advocated has been aptly called "The Multiple Seizure Bludgeon."

It is accordingly respectfully urged that the courts below abused their discretion by improvidently misconceiving the applicable legal and equitable principles, particularly the matter of the constitutionality of unrestricted "multiple seizures" under the Act.

CONCLUSION.

It is respectfully urged, for the foregoing reasons, that a writ of certiorari should be granted. This is clearly a case "Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute of the United States, which has not been, but should be settled by this Court; or where that court has not given proper effect to an applicable decision of this Court" as specified in Rule 38.5 (c) of the Rules of this Court, as a reason for granting the writ. The questions involved are as novel as they are important and should be reviewed by this Court.

Dated at Chicago, Illinois, March 10, 1953.

Respectfully submitted,

EDWARD BRODKEY,
FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
ALBERT BRICK,
Counsel for Petitioner.

APPENDIX.

Statutes Involved.

The following statutes must be considered in connection with this petition for a writ of error:

THE FEDERAL INSECTICIDES, FUNGICIDE AND RODENTICIDE ACT OF 1947.

(7 U. S. C. § 135g, 61 Stat. 170.)

"SEIZURES; DISPOSITION; COSTS AGAINST CLAIMANT.

"Sec. 9. a. Any economic poison or device that is being transported [in interstate commerce] shall be liable to be proceeded against in any district court of the United States in the district where it is found and seized for confiscation by a process of libel for condemnation—

(1) in the case of an economic poison—

(a) if it is adulterated or misbranded; * * *."

THE FEDERAL FOOD AND DRUGS ACT OF 1906 (WILEY ACT).

(21 U. S. C. Sec. 14, Act of June 30, 1906, c. 3915, § 10, 34 Stat. 771.)

"SEIZURE OF ORIGINAL PACKAGES IN INTERSTATE * * * COMMERCE.

"Sec. 10. Any article of food, drug or liquor that is adulterated or misbranded [in interstate commerce], * * * shall be liable to be proceeded against in any district court of the United States within the district where same is found, and seized for confiscation by a process of libel for condemnation." etc.

THE FEDERAL FOOD, DRUG AND COSMETIC ACT OF 1938.
(Copeland Act.)

(21 U. S. C. § 334, Act of June 25, 1938, c. 675, § 304, 52 Stat. 1044.)

"SEIZURE.

"Sec. 304. (a) Any article of food, drug, device or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against * * * on a libel of information and condemned in any district court of the United States within the jurisdiction of which the article, is found." etc.

"*Provided, however,* that no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel or condemnation proceeding under this Act based upon the same misbranding * * * when * * *." etc.

In the Supreme Court of the United States

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No. 660

VICTRYLITE CANDLE CO., A Wisconsin Corporation
Petitioner

v.

CHARLES F. BRANNAN,
Secretary of Agriculture, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Two libels for condemnation of petitioner's product known as "MOSKEETO-LITES with an effective mosquito repellent" were filed in the District Court for the Northern District of Illi-

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nois in June 1952. The libels were filed under Section 9 of the Federal Insecticide, Fungicide and Rodenticide Act of June 25, 1947, 7 U.S.C., Supp. V, 135g, on the ground that the product was misbranded. The Government was ready to proceed to trial on one of the libels on June 23, 1952, but petitioner requested and was granted a continuance "until the fall" to complete its experimental work to support its case. (R. 59, 69-70.)

On June 30, 1952, a similar libel against another shipment of Moskeeto-Lites was filed by the Government in the District of Columbia. Petitioner thereupon instituted proceedings in the District Court for the District of Columbia seeking an injunction against any further libels and against the prosecution of any action other than the postponed Illinois proceeding. A motion for a preliminary injunction was denied by the District Court and its order was affirmed by the Court of Appeals on December 22, 1952 (R. 98-101; 201 F. 2d 206). The Court of Appeals expressed the view that there could be more than one seizure under the Act and that the Government was justified in seeking to obtain as promptly as possible one adjudication on the merits. The petition for a writ of certiorari, filed March 16, 1953, seeks review of that judgment.

Petitioner seeks to review the denial of a preliminary injunction. No abuse of discretion can be shown (*Alabama* v. *United States*, 279 U.S.

229), and, on the merits, even apart from its interlocutory character, the decision is plainly correct for the reasons stated therein. See *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594. Furthermore, since the filing of the petition for certiorari, the libel proceeding in the United States District Court for the Northern District of Illinois, which had been postponed, has been tried, and on April 1, 1953 that court found that petitioner's product was not misbranded. The Government is appealing from that decision. But, as the court below was advised, no additional libels against petitioner's product will be instituted unless and until that decision is reversed. Petitioner is thus plainly in no present danger of the irreparable injury alleged, and for that reason alone would not be entitled to either a temporary or a permanent injunction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN
Acting Solicitor General.

MAY, 1953.

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REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION.

EDWARD BRODKEY,
ALBERT BRICK,
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10 S. La Salle Street,
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Attorneys for Petitioner.

May 28, 1953.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

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CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION.

The suggestion of the Acting Solicitor General on page 3 of his Memorandum in Opposition to the petition for a writ of certiorari herein that

> "* * * no additional libels against petitioner's product will be instituted unless and until that decision is reversed. Petitioner is thus plainly in no present danger of the irreparable injury alleged, and for that reason alone would not be entitled to either a temporary or a permanent injunction"

completely ignores the fact that petitioner, in addition to being deprived of the seized product and saddled with the

expense of litigation, is being irreparably injured by the maintenance of the *status quo* alone, under which its business and good will is being continually destroyed by the refusal of its customers to deal in its products, one of which, Moskeeto-Lites, has heretofore been seized for an alleged violation of the law. This Court has recognized the irreparable injury to business inherent in seizure, threat of seizure and statutory penalty. *Youngstown Sheet & Tube Co., et al.* v. *Sawyer*, 343 U. S. 579, 585; *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 97-99; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 510. Irreparable injury may exist without regard to the possibility of a renewed illegal or unconstitutional act by a defendant in cases where the act sought to be enjoined and the injury complained of is, as here, a continuing one. An injunction is required to assure petitioner's customers that they may sell its products without fear of seizure. And with respect to any promise of libelant to abandon further seizures *pendente lite*, this Court is respectfully reminded that in *United States* v. *Oregon Medical Society*, 343 U. S. 326, 333, it said:

> "When defendants are shown to have settled into a continuing practice * * *, courts will not assume that it has been abandoned without clear proof. *Local 167* v. *United States*, 291 U. S. 293, 298. *It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.* Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445." [Emphasis supplied.]

Further, the case of *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, relied on by the Government here, is not controlling. It arose under a statute materially different from that applicable to the case at bar. Petitioner believes that there has been not only an abuse of discretion by the

trial court in denying petitioner injunctive relief against "multiple seizure", but that there is no question of discretion involved since (1) the Statute does not authorize multiple seizures and (2) if it did, it would be unconstitutional under the facts of this case.

In view of the fact that the Government has advised this Court that, since the filing of the petition herein, it lost its case on a trial of the product on its merits in one of the libels pending in the Northern District of Illinois, wherein the District Court decided that Moskeeto-Lites were not misbranded and dismissed the libel, from which the Government has appealed,* this Court may deem it appropriate to presume that the equities herein are with petitioner and to grant the writ.

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May 28, 1953.

* Both the District Court for the Northern District of Illinois, Eastern Division, and the Court of Appeals for the Seventh Circuit have since denied the Government stays in these proceedings.